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# Supreme Court of the United States

OCTOBER TERM, 1946

No. 162

HOMER GLEN WILCOX, *Petitioner,*

*v.*

LT. GEN. J. L. DEWITT, *Respondent.*

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

A. L. WIRIN,
*Counsel for Petitioner.*

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
NANETTE DEMBITZ,
MARION P. AMES,
WALTER GELLHORN,
*Of the New York Bar,*
*Counsel for the National Office*
AMERICAN CIVIL LIBERTIES UNION

A. L. WIRIN,
*Counsel for the Southern California Branch*
AMERICAN CIVIL LIBERTIES UNION

FRED OKRAND,
CHARLES A. HORSKY,
*Of Counsel.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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**Cases:**

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**OPINION BELOW.**

Petitioner seeks review of a decision by the United States Circuit Court of Appeals for the Ninth Circuit in which that Court upheld the validity under the Constitution of the United States of an order issued by respondent prohibiting petitioner's presence in the State of his residence and in large areas of the United States, and likewise upheld the constitutionality of respondent's enforcement of his order by forcibly transporting petitioner out of his State of residence. The Circuit Court accordingly reversed the judgment (R. 304-305) rendered for the petitioner by the District Court of the United States for the Southern District of California. The opinion of the Circuit Court (R. 324-339) and the findings of fact and conclusions of law of the District Court (R. 215-303) are not reported.

## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 28, 1947 (R. 340). The issues of which review is here sought, as to the validity and constitutionality of respondent's order and action, were raised in the District Court, where they were decided in part in petitioner's favor, and in the Circuit Court where they were decided adversely to petitioner over his argument. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

## QUESTIONS PRESENTED.

1. Whether respondent's exclusion order against petitioner, prohibiting his presence in his State of residence and in large areas of the United States, was authorized by Public Law 503 and Executive Order 9066 and was valid under the Constitution of the United States.

2. Whether respondent's forcible removal of petitioner from the State of California, as a method of enforcing the exclusion order against petitioner, was authorized by Executive Order 9066 and Public Law 503 and was valid under the Constitution of the United States.

3. Whether respondent is liable in damages for such forcible removal of petitioner.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND PUBLISHED ORDERS INVOLVED.

The Constitutional provisions here involved:

Article I, Section 1; Article I, Section 8; Article II, Section 2; and the Fifth Amendment,—are set forth in pertinent part in the Appendix, together with Executive Order 9066, issued February 19, 1942 (7 F. R. 1407) and Public

Law 503 (Act of March 21, 1942, c. 191, 56 STAT. 173, 8 U. S. C. Supp. III, 97a).

## STATEMENT.

This action was commenced with the filing in the District Court of the United States for the Southern District of California of a complaint for damages, on the basis of respondent's issuance and enforcement of an order prohibiting petitioner's continued residence in the State of California or his presence in large areas of the United States (R. 2-11). The case was determined in the District Court (R. 215) upon motions for summary judgment (R. 26-27, 61-62) on the basis of the complaint (R. 2-11) and answer (R. 2-25), affidavits (R. 29-59, 62-82, 84-100, 110-112, 114-118, 159-165), answers to interrogatories (R. 102-109) and stipulated facts (R. 83). The facts are uncontroverted.

Petitioner was born in Ohio in 1887 and is a United States citizen by birth (R. 3). He had resided in the State of California for the ten years prior to his expulsion therefrom by the respondent on September 6, 1943 (R. 3). From May 1939 until his expulsion, petitioner's occupation had been that of "county bureau manager" of a voluntary organization entitled "Mankind United", which had as its announced purposes the elimination of "illiteracy, poverty and war" and the establishment of "economic equality based on the principles promulgated by Christ Jesus, including particularly the Golden Rule of Brotherly Love" (R. 9-10).

### Issuance of Exclusion Order.

At some unspecified time prior to October 1942 respondent, who was the Commanding General of the Western Defense Command, had devised an Individual Civilian Exclusion procedure, which was applicable to all American citizens, other than those of Japanese descent, residing

within the eight states under his Command,[1] and under which respondent issued "Individual Exclusion Orders" prohibiting the subject's presence in his State of residence and in large areas of the United States. This procedure consisted of (1) collection by one of respondent's officers of "intelligence reports" as to the citizen from the Federal Bureau of Investigation and other investigative agencies of the Federal Government; (2) respondent's appointment of three of his officers as a Board to consider whether the citizen should be excluded and the Board's notification to the citizen that he could appear before it; (3) summarization of all information about the citizen and a recommendation as to his exclusion by the Board and by various other reviewing officers, with a final summarization and recommendation by the Assistant Chief of Staff of respondent's Civil Affairs Division, addressed to the respondent; and (4) respondent's issuance, if he considered it desirable, of an Individual Exclusion Order against the citizen (R. 238-240, 228-230).

On October 26, 1942, petitioner was served with a document stating that respondent had appointed a Board of officers to consider whether "military necessity" required the issuance of an order excluding petitioner from unspecified "Military Areas"; that he could, if he wished, appear before the Board of Officers on November 3, 1942; but that material in the hands of the Board would not be made available to him for his inspection (R. 231-233). Petitioner appeared before the Board and was informed merely that he could submit evidence as to his birthplace, citizenship, and

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[1] The Western Defense Command consisted of Washington, Oregon, California, Arizona, Montana, Idaho, Utah and Nevada (R. 216). Citizens of Japanese descent were evacuated en masse from the West Coast (*see* Korematsu v. United States, 323 U. S. 214), and aliens whose continued residence was deemed undesirable were interned under the alien enemy control program.

other such items of personal history, and as to the circumstances of his membership in Mankind United and the nature of his duties and activities as a Bureau Manager of the organization (R. 234). Petitioner submitted to interrogation of a general nature by the Board, but was confronted with no witnesses nor apprized in detail of the information against him in its possession (R. 16). The Board recommended that no order of exclusion issue against petitioner (R. 236); an additional intelligence memorandum was then addressed to the Board, but it nevertheless reaffirmed its conclusion (R. 237). The intelligence reports included in the file on petitioner contained statements by various informants as to the activities and speeches of petitioner and other leaders of "Mankind United" in connection with that organization.[2]

On December 28, 1942, respondent issued an Individual Exclusion order against petitioner, which stated as its grounds only "that the present action is dictated by military necessity", and prohibited him after the expiration of ten days from being in the States of California, Washington, Arizona, Oregon, and numerous other States (R. 240-241).

The exclusion order was served upon petitioner on January 22, 1943, accompanied by a notice by respondent that its execution was stayed because of a pending criminal proceeding against petitioner (R. 243-246); respondent likewise thereafter served such a notice with respect to the pendency of the proceeding commenced by petitioner in the

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[2] These reports are contained in the second volume of the record filed in the Ninth Circuit Court of Appeals in the case of *Wilcox v. DeWitt*, Case No. 10650; this record was incorporated by reference as part of the record in the instant proceeding (R. 314). The volume containing the reports will herein be designated as "R. II", and the first volume of the record filed in Case No. 10650 as "R. I."

United States District Court for the Southern District of California to enjoin enforcement of the exclusion order (R. 254-255).

**Forcible Expulsion and Return.**

Immediately upon the denial of the injunction by the District Court, and in fact even before the petitioner or his attorney had received word of the determination of the court (R. 267), respondent moved to enforce the exclusion order. On September 6, 1943, a military party acting under respondent's direction broke into petitioner's home and physically seized him and removed him to the State of Nevada (R. 267-268).

Upon the filing of the District Court's findings and judgment in November 1943 (R. 270), petitioner's attorney filed a notice of appeal therefrom (R. 285). Within the same month officers of the Western Defense Command re-considered whether petitioner's exclusion was desirable (R. 285-286). Thereafter, on January 15, 1944, the Commanding General[3] suspended the exclusion order against petitioner and advised him that he could return to the State of California (R. 286-287). Petitioner thereupon returned to San Diego and has continued to reside there. On March 22, 1944, the exclusion order was finally rescinded (R. 287); and in August, 1944, upon respondent's motion, petitioner's appeal from the District Court's denial of the injunction was dismissed as moot (R. 287-289).

**Opinion of the District Court.**

The District Court concluded that all issues as to the validity of the exclusion order were res judicata by virtue of the District Court judgment in the injunction suit, and that the only question for determination in the instant ac-

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[3] Respondent had been succeeded as Commanding General by Lt. Gen. Emmons in September, 1943 (R. 269).

tion was the legality of respondent's forcible physical enforcement of the order (R. 298). As to this issue the Court held that Public Law 503 was the only method that had been intended for enforcement of the exclusion order (R. 299).

**Opinion of the Circuit Court.**

The Circuit Court concluded, in reversing the District Court's judgment for petitioner, that forcible expulsion as a means of enforcing the exclusion order was authorized by Executive Order 9066 and Public Law 503. This conclusion rested in part on the view that criminal prosecution might not have been a sufficient sanction for the exclusion orders issued under the Executive Order and statute, particularly since one such order directed the mass exclusion of some one hundred thousand persons of Japanese descent. The Circuit Court also supported its conclusion as to authorization by the statement of one of the Congressional proponents of Public Law 503 and by this Court's language in *Korematsu v. United States*, 323 U. S. 214 (R. 325-332).

As to the justification for the order against petitioner and for its enforcement, the Court, quoting some of the intelligence reports (R. 332-335) and the opinion of the Assistant Chief of Staff of respondent's intelligence division (R. 335) stated that there was " 'reasonable ground' " for respondent's belief that petitioner's activity " 'might instigate others to carry out activities which would facilitate the commission of espionage and sabotage and encourage them to oppose measures taken for the military security' " (R. 337-338). It held, therefore, that there was a rational factual basis for the exclusion order against petitioner and for its enforcement (R. 338).[4]

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[4] The Circuit Court did not consider the arguments as to whether the validity of the order was res judicata (R. 338).

As to the validity of the issuance and enforcement of the order without a hearing other than that before the Board of Officers, the Circuit Court held that the procedure used was not violative of due process of law; it rested this conclusion on the basis that petitioner's exclusion was within respondent's "military discretionary powers", and on the basis that the exclusion of over seventy thousand American citizens of Japanese descent was upheld in the *Korematsu* case although no hearings were accorded to them (R. 338-339).

**REASONS FOR GRANTING WRIT.**

This case involves highly significant Constitutional issues as to the limits of the war power of the United States in relation to the control by military officers of the personal liberties of civilian citizens. These issues have not heretofore been presented for this Court's determination, and were decided by the Circuit Court on the basis, in part, of interpretations of this Court's decisions, which we maintain are erroneous.

In *Hirabayashi v. United States,* 320 U. S. 81, and *Korematsu v. United States,* 323 U. S. 214, this Court upheld measures adopted pursuant to the Executive Order and statute under which the respondent's order against petitioner was issued. While the Circuit Court relied on both of these decisions, they in fact control only minor aspects of the instant case, and the differences between the issues there involved and those here in question highlight the importance of the grant of the instant petition. In both the *Hirabayashi* and *Korematsu* cases, the measures in question were taken at a time when there was a reasonable basis for concluding that invasion of the United States was imminent, and the measures were in large part supported on that ground. In each case the measure was taken against a group of persons on a mass basis and was upheld on the

ground that action against the group as a whole was justified because there was a reasonable basis for apprehending disloyalty from some of its members, because of the difficulty of distinguishing the potentially disloyal, and because the danger of imminent invasion justified the failure to attempt to so distinguish. And in each case the order was enforced through civil process, that is, through criminal prosecution.

The instant case poses entirely different but equally important issues. Here an order drastically affecting the liberty of an individual citizen was issued on the ground of the supposed potential disloyalty of that individual. Though it was issued and enforced at a time when no invasion was imminent, no semblance of the procedure generally guaranteed by due process of law in the issuance of such an order was accorded either before or after its issuance. The Circuit Court's reference to the fact that in the *Korematsu* case the exclusion of over seventy thousand citizens was upheld though they received no hearing is not persuasive as to the validity of the order against petitioner, for this reasoning ignores the clear distinction drawn by this Court between the due process requirement for the issuance of a quasi-judicial order, such as that here involved, and of a legislative order. This Court has fully recognized that the war power, like the other powers of the Federal Government, is limited by the due process clause. Thus, while we concede, and, in fact, assert, the flexibility intrinsic in the standard of due process of law, we respectfully urge that this Court determine whether the procedure used in the issuance of the order against petitioner complied with this standard.

Respondent's enforcement of his order against petitioner by using troops physically and forcibly to remove petitioner is an unprecedented measure. No such military act against a civilian citizen has previously been in issue before this

Court, and the only acts of even a comparable nature in the history of this country have been taken pursuant to declarations of martial law. But it seems apparent that the circumstances existing at the time of petitioner's removal were far from those justifying martial law under the decisions of this Court. In upholding General DeWitt's act the Circuit Court relied in part on a dictum of this Court in *Korematsu v. United States;* that "the power to exclude includes the power to do it by force if necessary." We believe that the full implications of this dictum should be considered by this Court and that such dictum should not be permitted to countenance the exercise of such a drastic power as that here involved without this Court's careful consideration.

Even assuming the Circuit Court was correct in its holdings as to the constitutionality of the procedure adopted by the respondent in issuing the order and of his method of enforcement, the case presents the important issue of whether the circumstances as to petitioner were such as to warrant the exercise of these extraordinary powers. As to these circumstances, the Circuit Court appears to have accepted bits of information in the intelligence reports respecting petitioner's statements without any consideration of the context or true import of such statements, and to have accepted without question the opinion of one of respondent's officers as to petitioner's dangerous character. We do not believe the question of the constitutionality of respondent's action in the light of the facts pertaining to petitioner has received adequate judicial review.

Review of the instant decision is essential to the completion of this Court's consideration of the primary constitutional issues arising from the military control over the personal liberties of civilian citizens during World War II, other aspects of which were considered in the *Hirabayashi*

and *Korematsu* cases and in the martial law cases: *Duncan v. Kahanamoku* and *White v. Steer*, 327 U. S. 304.

The danger of arbitrary Executive action is greatest when war or other emergency causes uncritical acquiescence in official determinations purportedly rooted in the emergency. It is essential therefore for this Court to reaffirm in the instant case the principle that an allegation of "military necessity" will be subjected to searching judicial scrutiny.

## ARGUMENT.

### I

### THE EXCLUSION ORDER PROHIBITING PETITIONER'S PRESENCE IN HIS STATE OF RESIDENCE AND IN LARGE AREAS OF THE UNITED STATES WAS UNCONSTITUTIONAL, AND WAS UNAUTHORIZED BY EXECUTIVE ORDER 9066 AND PUBLIC LAW 503.

We shall consider the unconstitutionality of the exclusion order before considering its lack of authorization because the argument on the latter point rests in large part on the former.

#### *A. THE PROCEDURE FOLLOWED IN THE ISSUANCE OF THE EXCLUSION ORDER VIOLATED DUE PROCESS OF LAW WITHIN THE MEANING OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.*

It is unarguable that the information upon which the exclusion order was based consisted largely of "Intelligence" reports which embodied in many instances second and even third-hand versions of incidents and statements even though more reliable information about them was easily available; that the Intelligence reports also contained excerpts from various documents without information as to the context of such excerpts although the original documents were easily available; and that the purported basis for the summaries and opinions of the various Army officers included in the file were these same Intelligence reports, and the reliability

of the former therefore depended on the extent to which they were supported by the latter and the accuracy of the latter (R. II, 340-343; see contents of R. II, discussed in greater detail below).

Further, petitioner not only could not cross-examine those who had given the information against him, but could not even attempt otherwise to refute the bulk of it because it was not disclosed to him. (See Finding of District Court, R. 242-243.) Petitioner's appearance before the Board of Officers did not, and was not intended to, give him an opportunity to refute the adverse information in the Administrative file; the order was not intended to be, and was not in fact, based on the remarks and statements made before the Board. In fact, the order was based in part on reports submitted subsequent to the Hearing Board appearance (R. 239-240, 237, 17; R. II, 352; R. I, 159-160, 280-281, 268-269). Respondent at all times maintained that petitioner's appearance was merely a courtesy which the Army was not required to accord, and that respondent could consider any information it chose, whether or not it had been mentioned by the Board or was even included in the file. (See Findings of District Court, R. 292-295.)

We shall briefly exemplify some of the effects of the procedure used herein, and then consider whether there was any justification for the drastic departure made by respondent from the types of procedure generally deemed to be due process of law.

### Nature of reports and summaries.

The Circuit Court's opinion repeats, as did the respondent's brief in that Court, a quotation in an FBI report of three sentences from a Mankind United statement which apparently was in the hands of the FBI, to the effect that the war could have been stopped if Mankind United members had "bestirred" themselves (R. 333). What the rest

of the bulletin would have disclosed as to the meaning of this ambiguous passage can only be conjectured; but some hint is supplied by another report to a similar effect. This report, which by chance, allows for a comparison between the facts and the summarization of them, indicates the delusive and prejudicial impression that could be conveyed as a result of the expurgation and summarization characteristic of the Intelligence reports. Thus, a report from the Office of the Assistant Chief of Staff G-2 "calls attention to the first paragraph (of a Mankind United letter) which expresses the organization's plan for rendering useless all implements of war" (R. II, 619, also quoted in Circuit Court opinion, R. 333). A reading of the letter itself, however, discloses that the sinister "plan" was "to build a world without Classes, Creeds, Wars or Poverty—for the Brotherhood of Man is the only hope of Peace and Security offered to a suffering, impoverished, bewildered humanity" (R. II, 622).

The distorted impression given by the summaries is also illustrated by one which states that petitioner had bought an electromatic typewriter which "can be converted into a radio transmitter and receiver" (R. II, 564). While the accompanying report gives no indication whatsoever that petitioner had purchased the equipment necessary for the conversion, and while it states that information on this point could be easily acquired, no attempt to ascertain the truth was made. Nevertheless, the suspicion aroused by the summary is in no way counteracted. Similarly, one of the reports emphasized that petitioner counseled members of Mankind United to evade Selective Service; a full statement of Mankind United's position on this question, however, showed that it was that members should request "deferment on the basis that they are ministers and students of a religious sect" (R. II, 343), a lawful viewpoint to urge even if one that was unwelcome to the military.

Since petitioner was not given an opportunity to explain most of the information in the file, the extent of its other inaccuracies can only be inferred from these examples and by the use of the customary criteria of credibility. The reports include scraps of information from all types of sources, without any attempt at a check on reliability or at corroboration of their truth. Thus one report relates that the FBI agent was told by an unnamed informant that the unnamed informant had been told by a minister that various statements had been made at a Mankind United meeting (R. II, 420). The minister, incidentally, had attended because some of his parishioners had begun to attend the meetings, and he appears to have disapproved of their attendance (R. II, 420-421). The meeting was a public one, as to which first-hand information was obviously available. As to the source of information, the reports contain no statements, except in the case of the minister and one or two other instances, as to the interests and connections of the various informants; as to whether, for example, an informant was being paid for investigation of Mankind United, so that it might well be to his interest to represent it as dangerous in order to encourage continuance of the investigation.

The most significant summary in the file is that of the Assistant Chief of Staff of the Civil Affairs Division. The final step in the exclusion procedure prior to the issuance of the order by General DeWitt was the recommendation to the General by the Assistant Chief of Staff of the Civil Affairs Division, accompanied by the latter's summary of the file. In this case, the recommendation was that the Hearing Board's recommendation against exclusion be disapproved and that the exclusion order issue. The bulk of the accompanying summary is a long quotation from the indictment of members of Mankind United, though no trial had then been held on the indictment. Also conspicuous in

the summary is the statement "that a very reliable informant reported that members of 'Mankind United' are 'possibly being schooled in methods of sabotage' " (R. II, 344). However, there is not one iota of information, except for the unidentified informant's unexplained viewpoint, as to any such schooling, and on the contrary there are frequent statements in the reports themselves as to Mankind United's opposition to violence and law-breaking of all types (R. II, 580, 591).

Indeed, the concluding reviews and summaries are replete with wild and unfounded "cloak and dagger" scare sentiments. Thus, the memorandum to the Assistant Chief of Staff of the Civil Affairs Division from the Assistant Chief of Staff, G-2, states without any attempt to support the statement on the basis of information or analysis, or consideration of Mankind United's religious and non-violent doctrines, that because of its opposition to the war its members "undoubtedly would commit acts of sabotage if directed to do so" (R. II, 414). He also states that enemy agents "are believed to be using members as collectors of military information" (R. II, 414). The latter statement seems to be a purposely vague and cryptic method of communicating a wholly unfounded dramatized view of the writer of the memorandum, for there is again no iota of supporting fact or opinion for it.[5] As to the importance of the summaries, even when a close analysis of the reports would have disclosed that the summaries exaggerated the information contained therein, it is clear that the summaries would be of influence upon the mind of a busy reviewer of the file.

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[5] The somewhat loose reference by Army officers to commission of espionage and sabotage without careful attention to accuracy was also notable in the testimony in the District Court in the injunction case (R. I, 191, 200-205).

It is to be noted, in conclusion, that respondent's procedure was so contrived as to obstruct any attack on his judgment as arbitrary and so as to shield his conclusions from scrutiny. Not only was the information on which he relied not disclosed to petitioner, but he made no findings indicating his basis for action, except that petitioner's exclusion was due to "military necessity". The standards, if any, used to determine whether exclusion was necessary (R. I. 231-232; see Findings of District Court, R. 293-294), and even the total number of exclusion orders (R. I. 258) were, for unknown reasons, kept a "military secret", thus impeding a scrutiny of respondent's acts.

NON-CONFORMITY WITH DUE PROCESS.

It seems clear that the exclusion order against petitioner was the type of order which must generally be based upon a quasi-judicial procedure; it affected an individual insofar as his constitutional rights were concerned and its substantive contitutionality depended on its basis in facts pertaining to that individual.[6] Obviously it could hardly be contended that all citizens living within the Western Defense Command lived there as a matter of military grace and privilege which the military could revoke whenever it so desired with or without a reasonable basis. Residing and earning a livelihood in a place of one's choice is a part of the constitutional right to life, liberty, and property, which can only be taken away by due process of law.[7] And the

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[6] Compare Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 93-94; Morgan v. United States, 298 U. S. 486, 480; Southern R. R. Co. v. Commonwealth of Virginia, 290 U. S. 190, 195; Commission of California v. Pacific Gas and Electric Co., 302 U. S. 388, 392-393; Shields v. Utah Idaho R. R. Co., 305 U. S. 177, 182.

[7] Allgeyer v. Louisiana, 165 U. S. 578, 589; Adams v. Tanner, 244 U. S. 590, 596; Meyers v. Nebraska, 262 U. S. 390, 399.

fact that it was a military officer who issued the order against petitioner cannot seriously be deemed to remove either the substantive or the concomitant procedural protection of due process. For in the Army's apparent theory that its *ipse dixit* as to military necessity was sufficient, it appears to have ignored the fact that it was, in making the exclusion order, exercising power over civilians delegated to it by Congress as an administrative agency, rather than directing combat operations on the field of battle.[8] That the respondent must function within constitutional limits when serving in the former role was so clearly established in the *Hirabayashi* and *Korematsu* cases that it does not seem necessary to dilate on this question at this point. And see *Duncan v. Kahanamoku*, 327 U. S. 304; Ex parte *Quirin*, 317 U. S. 1, 19; *Sterling v. Constantin*, 287 U. S. 378, 402. And the fact that the order was issued as an exercise of the war power does not of course permit a disregard of due process. See *Major General W. W. Eagles v. Samuels*, and *Major General W. W. Eagles v. Horowitz*, 91 Law. Ed. 252, 260, involving the issuance of orders under the Selective Service Act, a highly important exercise of the war power.

Thus, we are brought to a consideration of respondent's declaration that the procedure he used accorded the greatest measure of due process commensurate with the discharge of his duties (R. 108).

The major argument which seemingly could be advanced as justification for this position is that the danger to be

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[8] It may be observed that the exclusion order was issued mainly upon the basis of the work of the FBI, a civilian agency, and that the choice of the military as the agency empowered to issue exclusion orders resulted from the happenstance that the Attorney General had declined to accept authority for mass evacuation of persons of Japanese ancestry (DeWitt Final Report, Japanese Evacuation from the West Coast (Govt. Pr. Off. 1943), pp. 6-7), rather than from a deliberate choice of the military as the proper agency to issue individual exclusion orders.

apprehended from the residence in the Western Defense Command of citizens who might commit espionage or sabotage was so great that it was justifiable to order their exclusion even though all the information on which the estimate of the citizen was based could not be disclosed because of confidential sources. But we are not contending that the order would be invalid unless all sources of information were revealed. The flexibility in procedure permitted under the standard of due process of law, well exemplified in the Selective Service procedure (see *Eagles* cases, *supra*) also permits of the use of confidential informants where this is essential.[9] We do maintain, however, that the justification for non-disclosure of some sources of information does not justify the complete abandonment of any attempt to apprise the petitioner of the information against him or to act on a disclosed basis.

Obviously, for example, the necessity for concealment of the names of some informants cannot serve as a justification for refusing to reveal to petitioner, so that he could present a refutation for the respondent's consideration, the information subsequently presented in the District Court. Nor could withholding from petitioner the knowledge that the information held against him included excerpts from publications and public speeches possibly be justified on grounds of confidential sources.

The danger of accepting the military's *ipse dixit* as to the military necessity for concealment is neatly illustrated in the instant case. The respondent had deleted some items from the administrative file prior to its introduction in evidence in the District Court, stating, without specification,

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[9] *See* Loh Wah Suey v. Backus, 225 U. S. 460; Kwock Jan Fat v. White, 253 U. S. 454, 459. *But see* Chew Hoy Quong v. White 249 Fed. 869 (C. C. A. 9, 1918). Compare *In re* Quarles and Butler, 158 U. S. 532; Vogel v. Grauz, 110 U. S. 311; Segurola v. United States, 16 F. (2d) 563 (C. C. A. 1st, 1926).

that these deletions were necessary for "security" in order to guard investigative sources. It was revealed at the trial, however, that one of the deletions was of a paragraph favorable to the petitioner which was totally unconnected with any such security interest (R. I, 166). Another mysterious and obviously unjustified deletion noted in the file is of the entire synopsis of one report dealing with a Mankind United meeting (R. II, 464) though all the other reports commence with a synopsis. Since the report states that most of the remarks at the meeting were "metaphysical" and not comprehended by the members, it would seem likely that the synopsis also was favorable to petitioner, and that it was thought that the favorable inferences of the report itself would not be noted if no synopsis appeared. Even as to the revelation of the identity of confidential informants, the Army's most hush-hush point, it is to be noted that the Army did not object to such revelation in the criminal trial involving petitioner (R. I, 171-172), since the military were not there free to devise the procedure.[10]

The only other argument which might be urged as justification for abandonment of procedural safeguards is that time did not permit of their observance. Such a contention has no factual support; its most obvious refutation is the fact that a quasi-judicial hearing could have been held in place of petitioner's appearance before the Hearing Board. This is not a situation such as that which prevailed in regard to the issuance of the mass evacuation orders against

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[10] In re *Grove*, 180 Fed. 62 (C. C. A. 3d, 1910), is an interesting instance from the World War I period of the apparent misuse of the cloak of "security" interests. There the Secretary of Navy refused to produce certain documents on the plea that this would be detrimental to the interests of the United States, but thereafter conceded that introduction of the copies of the same documents by another party would not "cause the discovery of military or other secrets detrimental to the public interests."

persons of Japanese ancestry. Here the investigation of the subject of each order continued sporadically for months prior to its issuance while he was kept under surveillance; and the file was passed from hand to hand for review before issuance of the order. (See in particular R. I, 255-256.) The disregard of due process was, we believe, not due to any evaluation of necessity for such disregard, but was instead due to the concept that the military was not bound by this constitutional requirement. Even assuming that the respondent had reason to believe it might be desirable on some occasion to issue an order so quickly that notice and hearing could not be allowed, a procedure should have been devised, permitting inspection of the file or a similar step (again compare Selective Service procedure), that would have accorded the subject a more adequate opportunity for defense than that here afforded. In any event, in petitioner's case no justification existed, from the standpoint of timing, for the procedure here used.

And even if there was justification for issuance of exclusion orders without a preceding quasi-judicial procedure, then the applicable principle would be that due process must be satisfied by a judicial hearing as to the basis of the order in proceedings for its enforcement.[11] By this type of procedure the administrator can issue orders without temporal restriction and have the benefit of immediate compliance insofar as it is voluntary, but the subject of the order is accorded a hearing if he challenges it. Under this principle, however, respondent's enforcement of the order by physical forcible expulsion of petitioner, rather than by criminal prosecution, was invalid (See *infra*, Point II).

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[11] *See* Bourjois v. Chapman, 301 U. S. 183, 189; Phillips v. Commissioner, 283 U. S. 589, 597; Bragg v. Weaver, 251 U. S. 57, 59; North American Cold Storage Co. v. Chicago, 211 U. S. 306.

*B. NO REASONABLE FACTUAL BASIS FOR THE EXCLUSION ORDER AS A MEASURE FOR THE PREVENTION OF ESPIONAGE AND SABOTAGE HAS BEEN ESTABLISHED, AND ITS ISSUANCE WAS THEREFORE UNCONSTITUTIONAL.*

As we believe is demonstrated in the preceding discussion, practically none of the data as to petitioner in the Administrative file could reasonably be relied upon as the basis for conclusions about petitioner, in view of the fact that such data was not submitted to petitioner for possible refutation nor even submitted to a reasonable and fair check through investigative methods. However, for the purposes of argument, we shall ignore this blanket objection to the reasonableness of the exclusion order, and consider the items of information upon which respondent appears to rely. Under the *Hirabayashi* opinion, the order is invalid unless the circumstances "afforded a rational basis" for the order and unless "in the light of all the facts and circumstances there was [a] substantial basis for the conclusion * * * that [the order] was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort." *Hirabayashi v. United States*, 320 U. S. 81, 91.

We commence with the information as to petitioner quoted in the Circuit Court's opinion, as well as in respondent's brief in that Court, which may be assumed to be the most persuasive to be found in support of the order.

Mankind United's statement as to workers bestirring "themselves in their own behalf" (R. 333), while rather meaningless out of context, no doubt referred to the same type of religious bestirring as did other Mankind United exhortations (R. II, 622); for if any action other than religious had been advocated in this statement, it is obvious that the quoted excerpt would have included such advocacy. The following two quotations in the Circuit Court's opinion (R. 333, 334) would seem to weaken, rather than strengthen, respondent's case; for they demonstrate how abstract and

far-fetched were Mankind United's views and how far they were removed from advocacy of espionage and sabotage. It is clear from these quotations alone, and is further demonstrated by the remainder of the file (discussed *infra*) that Mankind United functioned in an entirely different sphere from that of concrete and tangible enemy action.

The final point of reliance in the opinion (R. 335), the quoted view of the Assistant Chief of Staff, G-2, can hardly be given any great weight. As in the memorandum of the same officer referred to above (p. 15), the statement as to sabotage is added as a concluding fillip without any support whatsoever for it. And it is to be noted that this officer carefully refrains from an affirmative statement that the leaders might attempt to persuade the members to commit sabotage. As to the criticism by Mankind United of the dimout regulations, etc., referred to in this memorandum and in other summaries, it is to be noted that Mankind United never advised disobedience to these regulations, and that it was not the Army's function to suppress such criticism, which petitioner had a right to voice along with the rest of American citizens, by its exclusion procedure.

The impression as to the unlikelihood of sabotage or espionage by Mankind United, which we believe is conveyed even by the items emphasized in the Circuit Court's opinion, is borne out by the record as a whole. Mankind United was an organization which preached, in the main, fanciful doctrines of a semi-religious and pacifist nature. For the most part the speeches at its meetings consisted on the one hand of attempts to raise money and, on the other, of statements on social change with such vague and metaphysical social proposals that they seemed beyond the members' comprehension (R. II, 508-528, 473, 477, 478). To a minor extent, there was protest about the then-current or proposed civilian restrictions, such as dim-out and rationing (R. II, 547), and occasional references to fantastic methods

of abolishing warfare such as those mentioned in the opinion. One of Mankind United's major "Plans" for abolishing warfare was to create a Brotherhood of Man; to the extent that it spoke at all in physical terms, it was, instead of using espionage and sabotage, basing its hopes for ending the war on "death rays" (R. II, 415, 424) and a force to disintegrate mountains (R. II, 606). To breach of the laws or to violence, it was at all times opposed (R. II, 591).

Perhaps the most important aspect of Mankind United's vague pacifist preaching, which conclusively shows that espionage or sabotage on the part of its members could not reasonably be apprehended, is the fact that none of the information in the file indicates that Mankind United had any sympathy with the enemy or interest in American defeat (see Findings of Hearing Board, R. II, 347-348, 353).[12]

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[12] The Board of Officers before which petitioner appeared made the following findings:

> "That this organization (Mankind United) is religious in character, and he (petitioner), as the manager of the local branch, is in what might be termed a 'religious racket'. The Board is convinced from the testimony that he is a 'religious hypocrite' using his organization as a means of extracting money from the unwary and credulous, under the guise of religion.
>
> "That he has no connections, contacts or communication with any person known to be subversive, or having subversive tendencies.
>
> "That he was diffident, vague and indefinite in the manner in which he gave his testimony in answer to many questions propounded by the Board, and this was undoubtedly based upon a fear that he might be prosecuted for his so-called 'religious activities'.
>
> "That the file contained no information that he ever taught, preached or spoke against the best interests of the United

Rather, Mankind United was concerned with the Utopian goal of stopping violence and warfare as a whole on the part of all belligerents simultaneously. Interference with American defense facilities would not even have been consistent with its goals.

Besides the facts as to petitioner, the facts as to the military situation at the time of the order must likewise receive consideration in evaluating its reasonableness. It is clear that there was not at that time any danger of invasion (R. 227, 272). Certainly, in view of the improved military situation (as compared to that in the early months of the war[13]) any danger that might have been reasonably appre-

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States, or that he ever advised any of the 'members' of his organization to violate the Selective Service Act.

"That he is erratic and egotistical, and can very well be termed a 'crack-pot'."

After the Board's recommendation that petitioner not be excluded, and after the submission to it of an additional intelligence memorandum, it found:

"The Board has carefully considered this memorandum. It has reconsidered the entire file and the evidence adduced at the original hearing, and it is still of the same opinion that no exclusion order should be issued in this case. And, the Board still feels that Wilcox is a harmless 'crack-pot' interested in this organization purely for financial reasons."

And the Board of Review which reconsidered petitioner's case in November, 1943, and recommended that the exclusion order be suspended, stated:

"* * * it is the opinion of this Board that because of lack of anything to indicate a connection between Wilcox and agents of foreign governments, there is no more likelihood of his engaging in acts hostile to the war effort on the West Coast than in any other part of the country". (R. 285-286.)

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[13] As to the danger of invasion at that time, see Hirabayashi v. United States, at p. 91; Korematsu v. United States, at p. 216.

hended from petitioner was insufficient to warrant his exclusion, even assuming it might have been warranted if invasion had been imminent.[14]

STANDARD EMPLOYED IN ISSUANCE OF EXCLUSION ORDER.

It seems clear that the Army used the exclusion procedure in the instant case to suppress speech which it considered undesirable. It considered within its jurisdiction "any activities which might induce disaffection" (R. I. 251, 253, 254). It was on this basis that the order against petitioner appears to have rested, with the petitioner's speeches deemed to be activities within this category. The review and recommendation of the Assistant Chief of Staff of the Civil Affairs Division to the Commanding General, emphasized as the basis for his recommendation of exclusion that petitioner's activities were such as to cause "dissension and unrest" (R. II, 350).

Indeed, respondent has made little attempt to establish that petitioner himself might have committed espionage and sabotage but merely that his activities might have encouraged others to do so; and the order was upheld by the Circuit Court on this basis (R. 337-338). But we believe it logically follows, and is clear on any analysis, that statements of the type here in issue, which give no indication of an intention to commit espionage or sabotage, or of the view that it should be committed, would not, by the same token, cause its commission. In any event, however, we do

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[14] That the respondent himself did not believe in the necessity for petitioner's exclusion seems apparent from his conduct, and is a further substantiation of the unreasonableness of the order. For despite the supposed necessity for petitioner's immediate exclusion in December, 1942, when the order was issued, its execution was stayed on two occasions; and four months after the exclusion was effected, which was nine months after it was first ordered, the order was suspended (R. 287).

not believe the order can be sustained on the basis that it was directed at the prevention of dissension or unrest or at the prevention of the encouragement of espionage or sabotage by others. For, as stated in the *Hirabayashi* case: "facts and the inferences which could be rationally drawn from them [must], support the judgment of the military commander" that the order was appropriate to meet a "danger of espionage and sabotage to our military resources [that] was imminent" (320 U. S. at p. 91). The danger that petitioner's activities might at some indefinite future date encourage espionage and sabotage by persons who might at some time be influenced by them, can hardly be deemed an imminent danger of espionage or sabotage. And an exclusion order issued on the basis here involved can not be deemed authorized by the Executive Order and the statute. This conclusion clearly follows from this Court's decision in Ex parte *Endo,* 323 U. S. 283, in which the commander's order was invalidated on the basis that it was unauthorized. In that case, as in the instant one, there was no danger of the commission of espionage and sabotage by the subject of the order. That is, there as here the the justification alleged for the order was that it was necessary as part of a program of preventing espionage and sabotage by others; and this Court held that the statute was to be construed as authorizing the issuance only of orders directly connected with that objective.

And it seems clear that the issuance of exclusion orders on such a flimsy basis as the prevention of that amount of dissension or unrest that Mankind United could engender, or of the encouragement of espionage and sabotage in such a vague respect as that here involved, would not be a valid exercise of the war power as limited by the due process clause. For the interference with liberty could not be deemed balanced by a sufficient benefit to the war effort. Further, if Public Law 503 were construed as authorizing

orders on such an indefinite and limitless basis, it would clearly involve an unconstitutional delegation of legislative power. In view of these patent grounds for invalidating the order, we shall merely note that an attempt to uphold it on the basis that it deterred dissension and unrest would require its scrutiny in the light of the rigid constitutional protection accorded to freedom of speech.[15]

*C. THE EXCLUSION ORDER WAS NOT AUTHORIZED BY EXECUTIVE ORDER 9066 AND PUBLIC LAW 503.*

There is no indication in the history of Executive Order 9066 or the legislative history of Public Law 503 that exclusion orders such as that here involved were intended to be authorized.[16] And the Order and the Law should be construed, if possible, so as to preserve their constitutionality. *See* Ex parte *Endo,* 323 U. S. 283. Thus, the Order and statute are to be deemed to intend a constitutional procedure in the issuance of orders, the issuance only of orders for which there is a reasonable basis and which are within the war power, and only those which do not involve an unconstitutional delegation of legislative power. On the ground of each of these limitations of authority, the order against petitioner is invalid. (See discussion under Headings A and B *supra*).

As to the question of delegation, it is to be noted that even if the instant order were directed at the prevention of espionage and sabotage by the petitioner rather than the prevention of the encouragement of such commission by

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[15] Bridges v. California, 314 U. S. 252; Thornhill v. Alabama, 310 U. S. 88; West Virginia State Board of Education v. Barnette, 319 U. S. 624; Thomas v. Collins, 323 U. S. 516; Schneider v. State, 308 U. S. 147; Hartzell v. United States, 322 U. S. 680.

[16] The Order was promulgated and the statutes enacted primarily to permit the mass evacuation of persons of Japanese descent from the West Coast. 88 Cong. Rec. 2723, 2730 (1942).

others, the issuance of such order would involve a much broader delegation of legislative power than that involved in the measures at issue in the *Hirabayashi* and *Korematsu* cases. For in the *Hirabayashi* case this Court pointed out that in view of the legislative history of Public Law 503, the discretion exercised in ordering the curfew was only as to when, if at all, and on what part of the West Coast to impose it. For Public Law 503 ratified the previously announced intention of imposing such a curfew on citizen as well as alien Japanese on the West Coast and thus could be read as if explicitly referring to and explicitly authorizing such a curfew. The extent of discretion exercised by respondent in his exclusion from the West Coast of all persons of Japanese ancestry was similarly limited to a determination of when, and over what portion of the West Coast, to make this measure effective, since Congress was informed both as to the nature and general locality of the contemplated evacuation and as to the subject of it. *Hirabayashi v. United States,* 90, 91; *Korematsu v. United States,* 323 U. S. 214, 216.

As to individual exclusion orders, however, no program of exclusion of citizens of ancestries other than Japanese had been promulgated, or intention to promulgate it announced, prior to the Act's passage. Thus, in ordering the exclusion of a citizen such as petitioner, respondent's discretion was completely unchartered except for the fact that his acts were to be for "protection against espionage and against sabotage to national-defense material, national-defense premises and national-defense utilities."[17] Accordingly, in determining to exclude petitioner, the respondent, guided only by this general standard adjudged what mem-

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[17] This standard was supplied by Executive Order 9066 and is to be deemed incorporated in Public Law 503. (See *Hirabayashi* case at p. 97)

ber of the citizenry to subject to his authority, with no direction or determination by Congress as to the class or type; what type of restriction to impose upon him; and where and when such restriction was to apply. This delegation of power seems clearly excessive. Compare *Schechter Poultry Corp. et al. v. United States,* 295 U. S. 495; *Panama Refining Co. v. Ryan,* 273 U. S. 388.

## II

THE ENFORCEMENT OF THE EXCLUSION ORDER BY FORCIBLE EXPULSION WAS UNCONSTITUTIONAL AND WAS NOT AUTHORIZED BY EXECUTIVE ORDER 9066 OR PUBLIC LAW 503.

### *A. SUCH ENFORCEMENT WAS UNCONSTITUTIONAL.*

It would seem self-evident under the system of government existing in the United States that the seizure of a citizen by a troop of soldiers, his expulsion by such soldiers from his home, and his enforced obedience to their directions, could be justified only by the direst emergency. And it is equally self-evident that at the time of the use of force against petitioner there was no such emergency; that there was no impediment to the functioning of the courts and of civil process which might have justified turning law-enforcement over to the military. The attitude in the United States towards the use of military process was explained by this Court with fervor and emphasis in Ex parte *Milligan,* 4 Wall. 2; *Sterling v. Constantin,* 287 U. S. 378; and *Duncan v. Kahanamoku,* 327 U. S. 304, and needs no amplification here. In the last cited case this Court stated:

> "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued * * *. Our system of government clearly is the antithesis of total military rule * * *. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments." (at p. 308).

The Circuit Court appears to accept respondent's position, with little question, that if the issuance of the order was justified, its enforcement by the troops was also *ipso facto* justified. But this appears to be a nonsequitur based on the premise that the military has all-embracing authority, if it has any, instead of its being merely an integral part of our system of government. On this logic, troops could have invaded every farm, home and factory in the country to enforce the numerous extraordinary measures justified by military necessity during World War II, to drag those unwilling to serve in the Army to barracks, or to seize merchandise or food that the Army ordered without resorting to civil process. We believe that it would take a much greater showing of emergency to justify law-enforcement by the military than to justify the mere issuance of an order by the military acting as the administrator of power delegated by the Executive and Congress in accordance with customary governmental methods.

For, while the mere issuance of orders by the military as administrator involves no question of martial law, the military's direct enforcement of such orders without resort to civil process and without an opportunity for complete judicial consideration of their validity, is another matter. Such enforcement is akin to an exercise of military rule in that it derogates from the powers of the judiciary. *Cf. Duncan v. Kahanamoku, supra.* And clearly the military situation in September, 1943 (See R. 227), fell far short of justifying such an exercise of military rule. For, as in Ex parte *Milligan,* 4 Wall. 2, and the *Duncan* case, there was no disruption of the orderly processes of government justifying a substitution of military for civil process. The pertinent factual consideration is not that there were a few infrequent incidents of enemy action along the Pacific Coast but that the country was free of the extraordinary state of emergency created by the imminence of invasion, and that

the civil government was functioning normally.[18] Certainly, when the slight degree of harm that could reasonably be deemed forseeable from petitioner's activities (*supra*, pp. 21-24) is considered in the light of the military situation, the military action against him cannot be justified as reasonable. And that there was no emergency justifying the summary military enforcement of the order, is clear from the suspension of the order four months after the forcible expulsion, despite the absence of any essential change in the military situation in the interim (See R. 286). It is a fair inference that in regard to the forcible expulsion, as in regard to the denial of a right to hearing (*supra*, pp. 16-20), respondent was chiefly interested in an assertion of the breadth of military power, rather than in a fear of harm to the country by petitioner.

Petitioner's forcible expulsion, then, was a violation of due process of law because there was no emergency sufficient to justify military enforcement of the order by summary seizure and eviction in place of the customary process of law enforcement, through criminal prosecution. The substitution of military for civil enforcement deprived petitioner, without justification, of the customary choice betweeen obedience to the law and punishment; and the use of force also violated due process because petitioner was thus denied an adequate means for a judicial review of the order. It is fundamental that the subject of an Executive or administrative order is entitled to judicial determination of the validity of the order before he is subject to irreparable injury at the hands of the Executive or administrator. *See Utah Fuel Co. v. National Bituminous Coal Commis-*

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[18] See *Schueller* v. *Drum*, 51 F. Supp. 383 (E. D. Pa., 1943); *Scherzberg* v. *Madeira*, 57 F. Supp. 42 (E. D. Pa., 1944); and *Ebel* v. *Drum*, 52 F. Supp., 189 (D. Mass., 1943), in which individual exclusion orders were invalidated for this reason.

*sion,* 306 U. S. 56; *Smith v. Illinois Bell Telephone Co.,* 270 U. S. 587; see also *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 366; *Pennsylvania v. West Virginia,* 262 U. S. 553, 592; *Oklahoma Natural Gas Co. v. Russell,* 261 U. S. 290, 293.

Indeed, the right to an adequate remedy where a violation of constitutional rights is alleged is itself guaranteed by the Constitution under the due process clause. *Gibbes v. Zimmerman,* 290 U. S. 326, 332. Respondent did irreparable injury to petitioner before petitioner secured a complete judicial review of respondent's order and in fact subverted petitioner's right to such review.[19] And even if petitioner had not in fact been irreparably injured by forcible expulsion before judicial review of the exclusion order, the mere fact that he was subject to this risk rendered the respondent's asserted authority unconstitutional. For petitioner was under the constant danger that his home would be entered and he would be summarily seized by extraordinary military force if he attempted to commence a civil action instead of immediately obeying the military order. Where the right to resort to the courts is fraught with such an extraordinary danger of physical force, the right to an adequate legal remedy has been denied. See *Life & Casualty Insurance Co. of Tennessee v. McCray,* 291 U. S. 566;

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[19] Even assuming that an injunction suit commenced by the subject of the order could be deemed to offer an adequate means of review, petitioner was denied this means; before the petitioner could even file an appeal from the District Court's order denying the injunction, in fact even before he heard that the order had been issued, the process of excluding him by force had begun (R. 267). Further, his appeal from the District Court decision was rendered moot by rescission of the Exclusion Order (R. 287-289). And obviously the present action for damages does not constitute an adequate remedy for the expulsion; this point is established by implication by the District Court's decision in the injunction suit, and by the Circuit Court's decision in *Alexander v. DeWitt,* 141 F. (2d) 573 (C. C. A. 9th, 1944).

*St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U. S. 63; *Crowell v. Benson*, 285 U. S. 22, 60; see also *Southern Ry. Co. v. Commonwealth of Virginia*, ex rel. *Shirley*, 290 U. S. 190, 198.

The case at bar falls well within the rule of these cases. There can be no question that summary seizure and ouster by troops as a possible consequence of disobedience to the exclusion order would deter a bona fide attempt to test the validity of the order and would prevent such a test being safely made. The possiblity of an action for damages, as the instant one, cannot be considered a sufficiently adequate redress for such a summary seizure and ouster so as to prevent its having an unconstitutional effect as a deterrent. Accordingly, the power claimed by respondent was a violation of due process of law.

The invalidity of enforcement through physical expulsion is further established by the circumstance that the procedure prior to the issuance of the exclusion order had not afforded petitioner an adequate opportunity to refute the information on which it was based and to defend himself against its issuance. Accordingly, due process required that such opportunity be afforded in judicial proceedings to enforce the order (see *supra*, p. 20).

*B. ENFORCEMENT OF THE EXCLUSION ORDER AGAINST PETITIONER BY MILITARY FORCE WAS NOT AUTHORIZED BY EXECUTIVE ORDER 9066 AND PUBLIC LAW 503.*

While it is true that the statement quoted in the Circuit Court opinion from remarks on the floor of Congress (R. 330) indicates the quoted Congressman's understanding that General DeWitt could use military force to enforce his exclusion orders, the legislative history is not consistent on this question. Thus a Congressional Committee investigating the West Coast situation stated, as to General DeWitt's powers under Executive Order 9066:

> "In transferring authority over evacuation to the War Department the President authorized and directed

the Secretary of War and the appropriate military commanders to take such steps as he or they might deem advisable to enforce compliance, including the use of Federal troops and other Federal Agencies. However, General DeWitt considered that this authority did not embrace an enforcement procedure and stated that he would find it impossible to enforce his orders pertaining to these military areas without additional legislation." (H. R. 2124, 77th Cong., 2d Sess., Fourth Interim Report of Select Committee of House of Representatives Investigating National Defense Migration (1942), p. 167).

See also Report of Senate Committee on Military Affairs, 88th Cong. Rec. 2724 (1942).

Thus, the statements as to the meaning of the legislation, taken together, support either inference as to respondent's authority to exclude by force. But a clear indication as to his lack of such authority seems to arise from the fact that the authority was first conferred by the President acting alone, when he had no assurance that Public Law 503 would be enacted. For whatever the power of Congress and the President, together, certainly it would have been beyond the power of the President acting alone to authorize summary execution of the orders of a military commander and the use of federal troops against the civilian population. We should not imply an intention to the Executive Order which would render it illegal when a simple interpretation of the language used would not be repugnant to constitutionality. There are many ways in which Federal troops could properly be used in enforcing compliance with the orders and restrictions of the Commanding General and which the President acting alone might authorize.[20] For example,

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[20] The language on which respondent bases his assertion of authority is the following provision of the Executive Order, which concededly was ratified by Public Law 503:

"I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other

under Army Regulations 600-655 Federal troops could be authorized to aid in the enforcement of the orders and regulations by arresting the alleged violator and using such force as was reasonably necessary to bring him before the appropriate civil authority for action under Public Law 503. There is nothing in the Executive Order which indicates that the President intended to authorize any further action by Federal troops than that of such a nature and he should not be charged with the attempt far to exceed his authority by implying a broader interpretation of his language than was intended.

Finally, as we believe we have already demonstrated, even the President and the Congress jointly could not constitutionally have authorized petitioner's expulsion. The order and the statute should therefore be construed as not granting this power, in order to render them constitutional.

## III

### The respondent is liable for damages for his exclusion of petitioner.

At the outset of a consideration of respondent's liability, it is to be borne in mind that respondent was not merely a minor administrative figure nor was he merely carrying out an assigned military duty; but rather he was acting in a broad executive capacity, devising and executing a program of civilian controls. The very promulgation of Executive Order 9066 and Public Law 503, under which respondent purported to act, was at his instance (R. 217-223). Further, the procedure for the issuance of the exclusion order

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steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal agencies, with authority to accept assistance of state and local agencies."

against petitioner was devised by respondent (R. 228); the exclusion order was issued on respondent's initiative; no superior officer considered its advisability (R. I, 260); and respondent determined upon petitioner's forcible exclusion (R. 57-59, 103). And the program was from its inception criticized as unconstitutional (R. 248).

The justification for the instant action for damages is also demonstrated by the difficulty—in fact the impossibility, of petitioner's otherwise securing a review of respondent's acts. The exclusion procedure devised by respondent afforded no manner of judicial review for his acts. Then, by determining upon enforcement of his order by military force, respondent foreclosed the review which would have been a concomitant of criminal prosecution. Though the injunction suit would not in any event have provided the full review of the validity of the order to which petitioner is entitled, the respondent mooted petitioner's appeal in the injunction suit so he could not obtain a consideration of his constitutional rights in the higher courts.

The facts of the instant case thus provide a concrete illustration of the indispensability, within the framework of our limited forms of action, of the action for damages as a method of check and redress against those entrusted with governmental functions.

The importance of the action for damages in cases affecting constitutional rights points to a major division in the precedents on the liability of officials, which establishes liability in the instant case. For where the act complained of is unconstitutional, it is by the same token to be deemed clearly outside the scope of the official's authority. Thus, since we maintain that respondent's issuance and enforcement of the exclusion order were not only unauthorized but unconstitutional, we need not indulge in a close analysis of the cases holding an officer liable because he had acted clearly outside the scope of his authority, and those deny-

ing liability on the ground that he had acted within such scope but had merely made an error of law or fact. As to an official's liability for an unconstitutional action, see *Poindexter v. Greenhow*, 114 U. S. 270 (especially 288-290); *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 643-644; *Nixon v. Herndon*, 273 U. S. 536; *Yearsley v. Ross Construction Co.*, 309 U. S. 18; *Belknap v. Schild*, 161 U. S. 10, 18; *Kilbourn v. Thompson*, 103 U. S. 168; consider *Moyer v. Peabody*, 212 U. S. 78.[21]

Not only is the instant action for damages based on established principle, but a denial of its propriety might of itself be unconstitutional. For due process of law guarantees that the courts furnish a method for securing review of an alleged deprivation of constitutional rights and a remedy for such a deprivation. See cases cited *supra*, pp. 32-33; see also *Bell* v. *Hood*, 90 Law. Ed. 768. In the instant case there was no form of action other than an action for damages by which petitioner was able to secure such a review and remedy.

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[21] The rule is the same whether the statute as a whole is unconstitutional or as is more customarily the case, the Court is only concerned with the constitutionality of the particular application of it with which the defendant official is charged. See Poindexter v. Greenhow, 114 U. S. at p. 295:

> "And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of constitutional right." See also the same case, at p. 270.

No exception to the rule of liability is made in the case of military officers. See Luther v. Borden, 7 How. 1; Mitchell v. Harmony, 13 How. 115; see also McCall v. McDowell (C. C., D-Cal. 1867) Fed. Cas. No. 8673, 15 Fed. Cas. 1235; Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9605. In any event, it is to be borne in mind that respondent in the instant case was exercising general governmental power rather than merely performing a duty in the course of combat or other customary military operations.

***EVEN IF RESPONDENT'S ISSUANCE OF THE EXCLUSION ORDER AND FORCIBLE EXPULSION OF PETITIONER WERE NOT UNCONSTITUTIONAL BUT WERE MERELY OTHERWISE OUTSIDE THE SCOPE OF THE AUTHORITY GRANTED BY EXECUTIVE ORDER 9066 AND PUBLIC LAW 503, HE IS LIABLE IN THIS ACTION.***

It is established that an official is personally liable for acts committed outside the scope of his authority, on the basis that he is, in such event, not acting for the Government but as any other individual. *Little v. Barreme*, 2 Cranch. 170; *Wise v. Withers*, 3 Cranch. 331; *Kendall v. Stokes*, 3 How. 87; *Bradley v. Fisher*, 13 Wall. 335; *Bates v. Clark*, 95 U. S. 204, 209; *Spalding v. Vilas*, 161 U. S. 483; *Standard Nut Margarine Co. of Florida v. Mellon*, 72 F. (2d) 557, *cert. denied*, 293 U. S. 605 (1934); *Cooper v. O'Connor*, 99 F. (2d) 135 (1938), *cert. denied*, 305 U. S. 643. See HARPER ON TORTS, pp. 666 *et seq.* While no liability is generally imposed if the official merely makes a mistake of law or fact while acting within his authority, this rule has no applicability in the instant case. Thus, respondent would not be liable if we were merely able to show a mistake of fact in that information upon which he had reasonably relied with regard to petitioner was in fact untrue. Or if he had merely made a mistake of law while acting within the scope of his authority, in that, for example, he had had authority to exclude petitioner but only from a smaller area than that designated. But here, we contend, respondent had no authority whatever to exclude petitioner because he was not intended to issue exclusion orders, if in any event against individual citizens, on the basis of the procedure here used, or on the basis of only an indirect connection between the subject of the order and the prevention of espionage or sabotage, nor to enforce exclusion orders, by physical force.

## CONCLUSION.

Wherefore it is respectfully requested that this petition be granted.

Respectfully submitted,

A. L. WIRIN,
*Counsel for Petitioner.*

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
NANETTE DEMBITZ,
MARION P. AMES,
WALTER T. GELLHORN,
*Of the New York Bar,*
*Counsel for the National Office*
AMERICAN CIVIL LIBERTIES UNION

A. L. WIRIN,
*Counsel for the Southern California Branch*
AMERICAN CIVIL LIBERTIES UNION

FRED OKRAND,
CHARLES A. HORSKY,
*Of Counsel.*

June, 1947.

## APPENDIX A.

CONSTITUTION OF THE UNITED STATES:

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States * * *

* * * * * * * * * *

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *

* * * * * * * * * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * * * * * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all others Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

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ARTICLE II

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SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

* * * * * * * * * *

Fifth Amendment:

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

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## APPENDIX B.

### PUBLIC LAW 503

Act of March 21, 1942, ch. 191, 56 Stat. 173 (18 U. S. C., Supp. III, 97a.)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

## APPENDIX C.

EXECUTIVE ORDER No. 9066, FEBRUARY 19, 1942, 7 F. R. 1407

### Authorizing the Secretary of War to Prescribe Military Areas

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions

applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.